

United States
Circuit Court of Appeals
For the Ninth Circuit

MARGIE LEE WALLAN, as Administratrix of the
Estate of LANIER SARLES WALLAN, De-
ceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING,
co-partners, etc., R. S. NORSWING, individual-
ly, and SHIRLEY LORRAINE RANKIN, as
Executrix, etc.,

Appellees.

THE FIRST NATIONAL BANK OF PORTLAND,
as Executor of the Estate of JOHN B. ELIE,
Deceased, etc.,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, etc., et al,

Appellees.

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, etc., et al,

Appellees.

APPELLANTS BRIEF

FILED
SEP 2 1948

Upon Appeal from the District Court of the United
States for the Southern District of California
Northern Division



United States
Circuit Court of Appeals
For the Ninth Circuit

TITLE PAGE

NO. 11995

MARGIE LEE WALLAN, as Administratrix of the Estate of LANIER SARLES WALLAN, Deceased, for and on behalf of the surviving widow, MARGIE LEE WALLAN, and the surviving daughters, BARBARA LEE WALLAN and SUSAN JEANETTE WALLAN,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY, and JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, d. b. a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,

Appellees.

APPELLANTS BRIEF

Upon Appeal from the District Court of the United States for the Southern District of California
Northern Division

United States
Circuit Court of Appeals
For the Ninth Circuit

TITLE PAGE

NO. 11996

THE FIRST NATIONAL BANK OF PORTLAND,
as Executor of the Estate of JOHN B. ELIE, De-
ceased, for and on behalf of the surviving wid-
ow, MATILDA C. ELIE, and the surviving
daughter, JACQUELINE ELIE,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business under the
assumed name and style of RANKIN AERO-
NAUTICAL ACADEMY; JOHN GILBERT
RANKIN and R. S. NORSWING, co-partners,
d. b. a. RANKIN AVIATION INDUSTRY; R. S.
NORSWING, individually, and SHIRLEY LOR-
RAINE RANKIN, as Executrix of the Estate of
JOHN GILBERT RANKIN, Deceased,

Appellees.

APPELLANTS BRIEF

Upon Appeal from the District Court of the United
States for the Southern District of California
Northern Division

United States
Circuit Court of Appeals
For the Ninth Circuit

TITLE PAGE

NO. 11997

MILTON JAMES SCOTT THOMPSON,

Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NOR-
SWING, co-partners, doing business as RAN-
KIN AERONAUTICAL ACADEMY, JOHN
GILBERT RANKIN and R. S. NORSWING, co-
TRY; R. S. NORSWING, individually, and
SHIRLEY LORRAINE RANKIN, as Executrix
of the Estate of JOHN GILBERT RANKIN, De-
ceased,

Appellees.

APPELLANTS BRIEF

Upon Appeal from the District Court of the United
States for the Southern District of California,
Northern Division

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STATEMENT OF JURISDICTIONAL FACTS

Jurisdiction of the District Court and of the United States Circuit Court of Appeals for the Ninth Circuit is founded on Section 24, Subd. (1), (b), of the Judicial Code, as amended, in that each of said actions is between citizens of different states, each plaintiff being a citizen of the State of Oregon and each defendant being a citizen of the State of California, and that in each action the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$3,000, the facts of jurisdiction being pleaded in the complaints filed in said actions, respectively, as set forth in the Transcripts of Record, pages 2, 3 and 4.

STATEMENT OF CASE

On February 23, 1947, in the State of Oregon, near the city of Klamath Falls, an airplane owned by John Gilbert Rankin and R. S. Norswing, co-partners, doing business under the name and style of Rankin Aeronautical Academy and Rankin Aviation Industries, and operated by said John Gilbert Rankin in furtherance of said co-partnerships, crashed to the ground fatally injuring said Rankin and two of his passengers, Lanier Sarles Wallan and John B. Elie, and injuring the third passenger, Milton James Scott Thompson.

On February 18, 1948, Margie Lee Wallan, as administratrix of the estate of said Lanier Sarles Wallan, and the First National Bank of Portland, as executor of the Last Will and Testament of said John B. Elie, for the benefit of the respective surviving wid-

ows and children of said deceased, and Milton James Scott Thompson for himself, under and pursuant to Oregon law, filed respective actions in the District Court of the United States for the Southern District of California, Northern Division, being Civil Actions 706, 707 and 708, against said co-partnerships, said R. S. Norswing, individually, as surviving partner, and Shirley Lorraine Rankin, as executrix of the estate of said John Gilbert Rankin, deceased, for damages resulting from said deaths and injuries, respectively, said actions being based on negligence of said John Gilbert Rankin, Transcripts of Record, pp 2 to 8.

The defendants in each of said actions filed a motion pursuant to Rule 12, Federal Rules of Civil Procedure, to dismiss the complaint on the grounds, 1) that plaintiff has failed to state a claim upon which relief may be granted, 2) that the plaintiff lacks capacity to sue, 3) that the defendants and each of them, lack capacity to be sued, and 4) that the Court lacks jurisdiction over the subject matter. T. R., pp 9, 10.

At request of defendants' counsel it was stipulated that said motion be heard by the Central Division of said District Court.

On May 24, 1948, after hearing, the District Court made orders granting said motions as to each of said actions and on June 3, 1948, entered judgment in each of said actions for defendants. T. R., 10, 11, 12. From these judgments the respective plaintiffs appeal. T. R., 12, 13.

SPECIFICATIONS OF ERROR

The District Court erred in granting defendants' motions to dismiss and in entering judgments for defendants.

ARGUMENT

The District Court did not hand down an opinion nor make particular findings nor indicate the ground or grounds upon which said motions were granted and the judgments for defendants entered. Therefore, it must be presumed that the District Court based its orders and judgments upon **all** the grounds advanced in said motions, from which it follows that Appellants must show, in relation to said motions, that:

1. The respective complaints **state** claims upon which relief may be granted;
2. The respective plaintiffs **have** capacity to sue;
3. The defendants and each of them, **have** capacity to be sued;
4. The District Court **has** jurisdiction over the subject matter.

THE LAW

I

The United States District Courts have jurisdiction of civil actions for damages resulting from wrongful death or injuries to the person, between citizens of different States, where the matter in con-

troverſy exceeds, excluſive of intereſt and coſts, the ſum or value of \$3,000.

Judicial Code, Sec. 24; 28 U. S. C. A. 41 (1)

Holmes v. Oregon etc. R. Co., 5 Fed. 75, 6 Sawy 262

Minnehaha County, S. D., v. Kelley, 150 F 2d 356

Memphis Street Rlwy. Co. v. Moore, 243 U. S. 299, 37 S. Ct. 273

Mexican Central R. Co. v. Eckman, 187 U. S. 429, 23 S. Ct. 211

Section 24 of the Judicial Code, 28 U. S. C. A. 41 (1), as pertinent to this appeal, reads as follows:

“Section 41, (1) * * ; **civil ſuits at common law or in equity**. **First.** Of all ſuits of a civil nature, at common law or in equity,* where the matter in controverſy exceeds, excluſive of intereſt and coſts, the ſum or value of \$3,000, and * * (b) is between citizens of different States, * *.”

COMMENT

That the United States Diſtrict Courts have juriſdiction of all ſuits of a civil nature, at common law or in equity, in all caſes where the juriſdictional amount and diverſity of citizenship is preſent, including actions for damages for perſonal injuries or reſulting from wrongful death, is ſo well eſtabliſhed as to preclude comment and the fundamental juriſdictional law ſhould not have been referred to at all except for the broad field opened by defendants' mo-

tions and the general conclusion of the District Court.

THE LAW

II

The law of the State of Oregon provides a substantive right of action for damages resulting from wrongful death which survives the deceased and may be maintained by the personal representatives of the deceased for the benefit of the widow and surviving dependents of the deceased.

Sec. 8-903, Oregon Compiled Laws Annotated.

Ross v. Robinson, 169 Or. 293; 124 P 2d 918

Ross v. Robinson, 169 Or. 314; 128 P 2d 956

Ross v. Robinson, 174 Or. 25; 147 P 2d 204

“Sec. 8-903. Action by personal representative for wrongful death: Limitations: Amount recoverable.

When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former for the benefit of the widow or widower and dependents and in case there is no widow or widower, or surviving dependents, then for the benefit of the estate of the deceased may maintain an action at law therefore against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and damages therein shall not exceed \$10,000.”

COMMENT

In the *Ross v. Robinson* case, Ross, as administrator of the estate of Lyna M. Ross, brought action against Robinson for the wrongful death of his intestate under the statute above quoted. The Oregon Supreme Court said:

“The action is for death by wrongful act, and the right to bring it is conferred by Section 8-903. O. C. L. A., which reads as follows: (Sec. 8-903 as above is then set forth verbatim)”

THE LAW

III

Under the laws of the State of Oregon actions for damages for injuries to the person or resulting from wrongful death survive against the personal representatives of the wrongdoer and create a substantive right of action which is not abated by the death of the wrongdoer.

Sec. 8-904, Oregon Compiled Laws Annotated.

In Re Vilas Estate

Vilas et al v. Harala, 166 Or. 122; 110 P 2d 940, 943

“Section 8-904. Survival of cause of action arising out of injury to person or death after death of wrongdoer: Amount recoverable.

Causes of action arising out of injury to the person or death, caused by the wrongful act or negligence of another, shall not abate upon the death of the wrongdoer, and the injured person or the personal repre-

sentatives of one meeting death, as above stated, shall have a cause of action against the personal representatives of the wrongdoer; provided, however, that the injured person shall not recover judgment except upon some competent satisfactory evidence other than the testimony of said injured person; and provided further, that the damages recoverable under the provisions of this act shall not exceed \$10,000."

COMMENT

In *Re Vilas Estate*, *supra*, the Oregon Supreme Court, quoting Sec. 8-904 as above set forth, upheld the appointment by an Oregon court of an administrator for the estate of a deceased wrongdoer for the purpose of enabling the person injured in Oregon in an automobile accident caused by the alleged negligence of the deceased wrongdoer, to maintain an action against such administrator for damages for such injuries under said statute.

Both Sections 8-903 and 8-904, O. C. L. A., were in full effect at the time of all the events mentioned in the complaints filed in said actions and are still in effect.

THE LAW

IV

The law of the place of wrong governs rights of action arising from wrongful death or injuries to the person.

Restatement, Conflict of Laws, Secs. 391, 378, 379, 384

Tennessee Coal, I & R C. v. George, 233 U. S.

354; 34 S. Ct. 587

Spokane & I E. R. Co. v. Whitely, 237 U. S. 487; 35 S. Ct. 655

V

The law of the place of wrong determines whether an action for damages for injuries to the person or arising from wrongful death survives the deceased and the death of the wrongdoer.

Restatement, Conflict of Laws, Sec. 390

Ormsby v. Chase, 290 U. S. 387; 54 S. Ct. 211

Gray v. Blight, 112 F. 2d 696, 698

VI

An action for damages for injuries to the person or resulting from wrongful death may be maintained in the United States District Court, having jurisdiction, in any State, on a right of action arising in another State where the wrong took place, if by the law of the State where the wrong took place such right exists, and such action may be maintained against the personal representatives of the deceased wrongdoer and may be brought by the personal representatives of the deceased injured, if by the law of the State where the wrong took place such right exists and such right is capable of enforcement in the State of the forum and is not offensive to its public policy.

Judicial Code, Sec. 24; 28 U. S. C. A. 41 (1)
supra

Rule 17 (b), Federal Rules of Civil Procedure
Minnehaha County, S. D., v. Kelley, 150 F. 2d 356

Mecom v. Fitzsimmons Drilling Co., 284 U. S. 183; 52 S. Ct. 84

Memphis Street R. Co. v. Moore, 243 U. S. 299; 37 S. Ct. 273

Mexican Central R. Co. v. Eckman, 187 U. S. 429; 23 S. Ct. 211

COMMENT

The law set forth in Paragraphs IV to VI appears too well established to require argument or comment.

THE LAW

VII

Under the law of the State of Oregon an action for damages resulting from wrongful death must be brought by the personal representative (executor or administrator) of the deceased for the benefit of the surviving widow or widower and dependents of the deceased or if none survive then for the benefit of the estate of the deceased.

Sec. 8-903, Oregon Compiled Laws Annotated, supra

Ross v. Robinson, 169 Or. 314; 128 P. 2d 956

COMMENT

The Oregon Supreme Court, in **Ross v. Robinson**, 128 P. 2d 956, gist 957, enunciates the firmly established law as to who must bring the action:'

"By force of the Statute (Sec. 8-903), an action brought for damages caused by the wrongful act or omission of another must be instituted by the personal representative of the deceased, for any bene-

ficiary. This statute is definite and certain as to when an action may be maintained by the personal representative of the decedent for the benefit of the decedent's estate. It specifies that, in case there is no widow or widower, or surviving dependents, then (the personal representative may maintain an action) for the benefit of the estate of the deceased'. The right of action is statutory and is granted to the personal representative for the benefit of those specified in the statute in the order therein named. It is only in the event of the nonexistence of preferred beneficiaries that there is a right of action in favor of other beneficiaries."

THE LAW

VIII

If the law of the State where the wrongful death took place designates a particular representative to sue, such representative may bring such action in the United States District Court, having jurisdiction, in any State, as the owner of a claim in trust for certain distributees.

Restatement, Conflict of Laws, Secs. 394, 396, c.
Cooper v. American Airlines, Inc., 149 F. 2d 355

COMMENT

Restatement, Conflict of Laws, distinguishes the representative capacity in suits of this nature from the common law rule that an administrator can sue only in the state of his appointment, expressing the better reasoned and applicable rule in Sec. 396 c, as follows:

“c. Where particular representative named in statute. If the death statute of the state of wrong names a particular representative to sue, such as the representative appointed in the state of wrong or the representative at the domicil of the deceased, such representative is the only person who can sue; but such representative may sue in any state as the owner of a claim in trust for certain distributees. The case then comes under the rule stated in Sec. 394.”

In **Cooper v. American Airlines, Inc.**, *supra* an executrix appointed in the State of Kentucky brought an action for wrongful death in the United States District Court for the Southern District of New York. On defendant's motion, the court dismissed the complaint on the ground that plaintiff lacked capacity to sue in the courts of New York and therefore under Rule 17 (b), Federal Rules of Civil Procedure, lacked capacity to sue in the United States District Court in New York. The United States Circuit Court of Appeals for the Second Circuit in reversing the lower court posed the question as follows:

“Under New York ‘law’ is there an exception to the general rule (precluding suit by a foreign personal representative) when that representative sues for wrongful death occurring in another State whose death statute constitutes the representative a nominal plaintiff vested with a cause of action for the sole benefit of specified persons?”

and held that:

“Under Kentucky ‘laws’ the executrix here is ‘merely a nominal plaintiff’ and ‘the real parties of interest are the beneficiaries whom (she) represents.’ If those beneficiaries had been permitted to and had brought suit in their own names, unquestionably their action would not have been ousted. To reach a different conclusion because the nominal plaintiff is a ‘representative’ appointed by a court of another state would be to wrest judgment, irrationally, on the sheerest verbalism.”

Appellants submit that this is the sound and just rule and to hold otherwise would be to cut off rights of innocent victims of negligent wrongdoers and to shock the comity policy among the states which Beale, *Conflict of Laws*, Vol. 3, 1651, refers to as:

“There is, moreover, in the law of every jurisdiction a strong policy in favor of recognizing and enforcing rights and duties created by a foreign law.”

THE LAW

IX

Under the law of the State of California a right of action exists for damages resulting from wrongful death which survives against the personal representatives of the deceased wrongdoer and representatives of a deceased meeting wrongful death are permitted to sue the representatives of the deceased wrongdoer for damages resulting from such wrongful death.

Hunt et al v. Authier, 28 Cal. 2d 288; 169 P. 2d 913

Nash v. Wright,.....Cal. App. 2d.....; 186 P. 2d. 691

COMMENT

The case of **Hunt et al v. Authier**, *supra*, provides the authority under California law permitting plaintiffs to bring these actions in their representative capacity against the personal representatives of the deceased wrongdoer. In the **Hunt** case, the widow for herself and as guardian of the three minor children of the deceased brought action against the personal representative of the deceased wrongdoer, for damage to property and estate of the deceased, **Hunt**, and for the pecuniary loss suffered by the widow and minor children. The California Supreme Court construed and applied Section 574 of the Probate Code of California, as amended in 1931, which is quoted in the opinion as follows:

“Executors and administrators may maintain an action against any person who has wasted, destroyed, taken, or carried away, or converted to his own use the property of the testator or intestate in his lifetime, or committed any trespass on the real property of the decedent in his lifetime: **and any person or the personal representative of any person, may maintain an action against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away, or converted to his own use, the property of any**

such person, or committed any trespass upon the real property of such person.”

and stated :

“Injuries suffered by the plaintiffs by the lessening of their estate and the invasion and deprivation of their pecuniary interest and right to future support from the decedent by the commission of the wrongful act is as much a destruction or injury to property as was involved in the foregoing cases; and the tort likewise in this case should be deemed to be an invasion of their property rights within the meaning of the present statute. Where the courts have not held such losses to be injuries to property, **it has been due to a reluctance to depart from ancient judicial declarations or to the absence of a statute designed to modify the old rule of non-survival.**

The legislature has definitely spoken, by the amendment of our statute, so as to enlarge the class of property rights and interests which shall receive protection in the event of the death of the wrongdoer. Where the legislature has so provided, the court should not countenance a tortious deprivation of property without redress.

“It follows that wherever a plaintiff has sustained an injury to his ‘estate’, whether in being or expectant, as distinguished from an injury to his person, such injury is an injury to ‘property’ within the meaning of that word in the present statute.”

“The plaintiffs have therefore stated a cause of

action for recovery from the defendants, of the material losses sustained, including the present value of future support from their decedent considering their respective normal life expectancies, but exclusive of any damages for such items as loss of consortium, comfort or society of the decedent.”

In *Nash v. Wright*, *supra*, the California Appellate Court again recognized the rule that an action for wrongful death may be maintained in California against the personal representative of the deceased tort-feasor, the question arising upon an appeal from an order granting plaintiff’s motion substituting the executor of a deceased tort-feasor as a party defendant. The court followed the decision of the Supreme Court of California in the case of *Hunt v. Authier*, *supra*, and quoted from the opinion:

“(1) that upon the death of Doctor Hunt a cause of action for wrongful death arose in favor of his heirs under Section 377, Code of Civil Procedure, and (2) that it continued to exist until the tort-feasor’s death, but (3) that upon his death the **survival of the action against the tort-feasor’s estate was effected by virtue of Section 574 of the Probate Code which affords the right to maintain action after the death of those who could have been plaintiffs or defendants if they had lived, in cases of injury to property, and to that extent has created a departure from the common law rule that actions ex delicto do not survive.**”

THE LAW

X

The right of action for damages for injuries to the person or resulting from wrongful death created and surviving under Oregon law is capable of being enforced under California law and is not offensive to the public policy of the State of California.

Hunt et al v. Authier, 28 Cal. 2d 288; 169 P. 2d 913

Nash v. Wright,.....Cal. App. 2d.....; 186 P. 2nd 691

COMMENT

The legislature of the State of California by the enactment of Sec. 574 of the Probate Code of California, as amended, and the Supreme Court of California by its construction and application of said statute in the **Hunt** case, *supra*, have enunciated the public policy of the State of California, for its own citizens, to be that an action for injuries or wrongful death resulting in pecuniary loss (injury to property or estate) to the wronged, survives both the wronged and the wrongdoer and may be brought by the personal representatives of the wronged against the personal representatives of the wrongdoer, and the enforcement, at the instance of an Oregon citizen, of a right of action under Oregon law designed to accomplish the same end is not offensive to the public policy of the State of California.

The nature of the remedy provided by Secs. 8-903 and 8-904, O. C. L. A., *supra*, as construed and

applied by the highest court of Oregon, and Sec. 574 of the Probate Code of California, as construed and applied by the highest court of California, with respect to redress for damages resulting from wrongful death, is practically the same, and accomplishes and is designed to accomplish the same ultimate end, which is to provide redress to the surviving widow or widower and dependents for the pecuniary loss to their estate resulting from the wrong.

The measure of damages recoverable in cases involving wrongful death is the same under both laws. In Oregon it is defined as "the pecuniary loss suffered", "to repair in a pecuniary way the losses sustained by the beneficiaries of the action", "the pecuniary benefits which the beneficiary might reasonably be expected to have derived from the decedent had his life not been terminated", **Hansen v. Hayes**, 175 Or. ~~870~~⁵⁵⁸; 154 P. 2d 202, **214**, "the amount the deceased * * would have accumulated as net savings at the time of his (natural) death", "the amount of pecuniary assistance and support which they (beneficiaries) might have reasonably expected to receive from the deceased had he lived", **Nordlund v. Lewis & Clark R. Co.**, 141 Or. 83; 15 P. 2d 980, **983**. In California in the **Hunt** and the **Nash** cases, *supra*, it is defined as "the support * * which they (widow and children) would have received from their decedent", "the material losses sustained, including * * future support from their decedent", and the injuries suffered are referred to as "lessening of their estate" and a "deprivation of their pecuniary interest" and "future support". This comparison leads to but one

conclusion, that the injury or damage sought to be redressed by the laws of both states is the loss to the "estates" of the decedent's beneficiaries. Laws so similar, having like purpose and end, do not offend the public policy of either state, but to the contrary offer remedial measures, each to the other.

With reference to No. 11997, the case wherein Appellant Thompson seeks to obtain damages for personal injuries, we respectfully direct the Court's attention to the modern trend of numerous recent decisions holding that if under the laws of the state where the cause of action arose it would survive the death of the wrongdoer the cause of action may, even after the death of the wrongdoer, be enforced in another state, and although under the laws of such other state it would have abated.

Chubbock v. Holloway, (1931) 182 Minn. 225; 234 N. W. 314, 868

Burgess v. Gates, 20 Vt. 326

Stratton Independent v. Dines, 126 F. 968; 135 F. 449 Certiorari denied; 197 U. S. 623; 49 L. Ed. 911; 25 S. Ct. 800

Kerston v. Johnson, (1932) 185 Minn. 591; 242 N. W. 329; 85 A. L. R. 1

Burg v. Knox, (1933) Mo.; 67 S. W. (2nd) 96

Rose v. Phillips Packing Co., 21 F. Supp. 485

Under the statute of Oregon a cause of action for injury to the person survives the death of the tort-

feasor. Section 8-904 O. C. L. A. *supra*. Hence at the time of the injury the plaintiff Thompson became vested with a definite right. The right of action against the personal representative of the deceased Rankin was and is property. He has now applied to a Court of law for aid in realizing on that right.

The situation is analogous to that in the case of **Chubbock v. Holloway, *supra***, wherein the plaintiff's cause of action arose in Wisconsin and by virtue of the statutes of that state survived the death of the wrongdoer. An action was brought in the State of Minnesota under the laws of which state the cause of action abated on the death of the wrongdoer. The Court of the State of Minnesota said in part:

“Plaintiff has suffered a loss through decedent's wrongful act. The law of Wisconsin gives him a remedy. Our public policy is not such as to prompt us in turning him from our door and relegating him to a foreign state where the defendant, perchance, having no property, could not be reached.....The public policy of the forum cannot, without any regard for logic or general principal of justice, be violated by the enforcement of a vested right created by the law of a foreign state. Especially is this so when there is, as here, nothing repugnant to good morals, and no violation of fundamental principles of justice.”

In **Rose v. Phillips Packing Co., *supra***, the District Court holds:

“In this connection it may be noted that the modern tendency of judicial authority is to disregard the differences between the various forms of Lord Campbell’s Act as expressed in the several state statutes; and indeed there is now very substantial authority for the view that the *lex loci delicti* may be sued on extra territorially even where the state of the forum has no similar statute at all.”

It would appear from the above cited cases that where the law sought to be enforced does not **violate** the public policy of the state of the forum the Courts of the forum should be open to the injured party for the redress of wrongs.

Hunt v. Authier, supra, declares the public policy of California is not against maintaining an action for wrongful death on the theory that the wrongful killing damaged the estate. It would appear that the survival of a cause of action for personal injury resulting in damages to the injured party should be no more repugnant to the public policy of the State of California than would the survival of a cause of action for damages resulting from wrongful death.

We therefore contend that the District Court should in all justice, give full effect to the transitory nature of tort actions and permit the injured party to pursue the right of action given him under the laws of the State of Oregon.

THE LAW

XI

A cause of action based on tort is not such a claim under the law of the State of California as must be presented to and rejected by the executor or administrator of the estate of the deceased wrongdoer as a condition precedent to the filing of an action thereon.

Thompson v. Byers, 116 Cal. App. 214, 218

Kagee v. Bencich, 27 Cal. App. 2d 469, 472

COMMENT

It is noted that in both the **Hunt** and **Nash cases**, *supra*, claims were filed with the executor or administrator of the estates of the deceased wrongdoers under the Probate Law of California and rejected before suit was filed. No claims were filed in the instant cases. The law of the State of California does not require filing or rejection of a claim based on tort. In **Thompson v. Byers**, *supra*, an action for conversion, the court held:

“The claim in this action was one arising in tort, It follows that it was not necessary to prepare and file with the executrix for allowance or otherwise, any claim. There is no statute requiring the presentation of such a claim to the executrix.”

In **Kagee v. Bencich**, *supra*, a later case likewise an action for conversion, the court held:

“The conversion constitutes a tort, and the only cases in which a claim is required to be filed are those arising upon contract.” (Citing **Thompson v. Byers**)

THE LAW

XII

The members of a partnership are jointly and severally liable to respond in damages for injury or resulting from wrongful death caused by the tortious act of one of the partners when acting in the general scope of the partnership business.

Section 79-305, Oregon Compiled Laws Annotated

Section 79-307, Oregon Compiled Laws Annotated

California Civil Code, Section 2409

McIntyre v. Kavanaugh, 242 U. S. 138; 61 L. Ed. 205; 37 S. Ct. 38

Dixon v. Haynes, 146 Wash. 163; 262 P. 119; 55 A. L. R. 1218

Where the liability for injury to the person is joint and several, the death of one of the persons liable does not bar an action against the other.

Sayles v. Peters, 11 Cal. App. 2nd 401; 54 Pac. 2nd 94

Lee v. Deasy, 19 Cal. App. 2nd 667; 66 P. 2d 175

National Automobile Ins. Co. v. Cunningham, 41 Cal. App. 2nd 828; 107 P. 2d 643

Hess v. Lowrey, 122 Ind. 225; 22 N. E. 156; 7 L. R. A. 90

COMMENT

The defendant, R. S. Norswing, being a partner of John Gilbert Rankin and the tortious acts of John Gilbert Rankin having been alleged to have been "in furtherance of the activities of said partnership" (Tr 11995, p 4; 11996, p 4; 11997, p 3) it follows under the provisions of Sections 79-305 and 79-307, O. C. L. A., *supra*, and California Civil Code, 2409, *supra*, the liability of defendant R. S. Norswing is joint and several. **McIntyre v. Kavanaugh**, *supra*; **Dixon v. Haynes**, *supra*.

The liability, being joint and several, became fixed on the defendant, R. S. Norswing, at the instant of the tortious act and was not abated by the death of the tort-feasor. If, for the sake of argument, the view were taken that no cause of action survives against the personal representative of the deceased tort-feasor, still under the authority of **Sayles v. Peters**, *supra*; **Lee v. Deasy**, *supra*; **National Automobile Ins. Co. v. Cunningham**, *supra*, and **Hess v. Lowrey**, *supra*, the causes of action and the right to bring same survives against the defendant, R. S. Norswing.

CONCLUSION

In the light of the law and authorities cited, which Appellants submit as controlling, the subject matter of the actions and the allegations contained in the complaints, it is obvious that:

1. The respective complaints state claims upon which relief may be granted;
2. The respective plaintiffs have capacity to sue;
3. The defendants and each of them have capacity to be sued;
4. The District Court has jurisdiction over the subject matter; and that the District Court erred in granting the motions to dismiss and entering judgments for defendants.

Respectfully submitted,

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